No. 89913-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

DANIEL LEE BROWN,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

AMICUS MEMORANDUM PURSUANT TO RAP 13.4(h) WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS AND WASHINGTON DEFENDER ASSOCIATION

Travis Stearns, WSBA 29335
Washington Defender Association
110 Prefontaine Pl. S., Suite 610
Seattle, WA 98104
(206) 623-4321
stearns@defensenet.org

D. Jack Guthrie, WSBA 46404
Suzanne Lee Elliott, WSBA 12634
Amicus Committee
Washington Association of
Criminal Defense Lawyers
705 Second Avenue, Suite 1300
Seattle, WA 98104
(206) 623-0291

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

I.
ARGUMENT WHY REVIEW SHOULD BE GRANTED

In *State v. Brown*, 316 P.3d 1110 (2014), the Court of Appeals concluded that the State, before trial, could charge Mr. Brown for providing a 911 recording that was necessary for an effective defense. The court found that such a fee violated neither RCW 10.01.160, which prohibits the State from imposing fees or costs "inherent in providing a constitutionally guaranteed jury trial," nor Article 1, Section 22 of the Washington State Constitution, which reads, in pertinent part, "In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed." *Id.* at 1112.

Although the Court of Appeals opinion suggests that the dispute in this case is a trivial one,[1] it is not. The question presented here is a question of first impression[2]:

> Where Const. Art. 1 Sec. 22 states that "no defendant be compelled to advance money or fees to secure the rights

---

[1] "Neither party, out of principle, will budge one cent. So we are asked to resolve a $17 dispute. . . ." *Brown* at 1110.

[2] North Carolina has addressed a similar issue: whether a $50 appointment-of-counsel fee at the time of arraignment violated Article 1, Section 11 of the North Carolina Constitution of 1868, which was later incorporated into the 1971 Constitution as Article 1, Section 23, which provides that "[i]n all criminal prosecutions, every [person] has the right . . . not [to] be compelled . . . to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty." *State v. Webb*, 358 N.C. 92, 94, 591 S.E.2d 505 (2004). That court found that the $50 fee was a "cost of prosecution" and was therefore an unconstitutional expense levied against all defendants notwithstanding their eventual guilt or innocence. *Id.* at 97.

> guaranteed to him" under the state constitution, may the State refuse to provide reproductions of materials the State concedes must be provided to the defendant unless the defendant pays for the cost of the reproduction?

The Court of Appeals has answered this question incorrectly and in a manner that will transform the current prevalent practice of providing discovery to all defendants before trial without charge. A charge of $17 may at first blush appear to be trivial. But for many defendants, even those who choose to hire counsel, this cost can be significant. In Washington, a defendant making minimum wage is paid $9.32 an hour. Thus, $17 represents two hours of labor for many people.

And while the facts of this case only deal with a 911 recording (valued by the State at $17), the opinion places no limit on the amount that can be charged for providing discovery. On its face, the lower court's opinion would allow the State to charge defendants for the reproduction of any discovery packet – no matter how lengthy and complex – before the defendant's guilt has been proven.

Mr. Brown's counsel has argued for review under RAP 13.4 Discretionary Review of Decision Terminating Review. It may be, however that the proper consideration is whether review should be granted under RAP 13.5 Discretionary Review of Interlocutory Decision. Because Mr. Brown's counsel has covered the considerations in RAP 13.4, this

memorandum will demonstrate that review is also appropriate under the considerations set forth in RAP 13.5.

A. THE COURT OF APPEALS COMMITTED PROBABLE ERROR WHEN IT MISAPPREHENDED THE MANNER IN WHICH MR. BROWN IS "COMPELLED" TO EXPEND COSTS BEFORE TRIAL. RAP 13.5(B)(2).

The final sentence of Article 1, Section 22 reads "In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed." The Court of Appeals first adopted a dictionary definition of "compelled" and then reasoned:

> Brown is not being forced, driven, impelled, threatened, or pressured to advance money or fees. Although the recording may be important to his defense, the State does not require him to obtain a copy. Brown is free to forego a copy and may even access the 911 recording without paying money or a fee. Due process affords a criminally accused defendant extensive discovery rights, but we know of no principle requiring the State to bear the expense of copying discovery materials for a nonindigent defendant.

Brown, 316 P.3d at 1112.

The Court of Appeals conclusion that "the State does not require him to obtain a copy" suggests that that Court misunderstands the problem. *Id.* One of Mr. Brown's "guaranteed" rights is the right to counsel and a right to a reasonable investigation. Art 1, § 22; *State v. Boyd*, 160 Wn.2d 424, 425, 158 P.3d 54 (2007). By charging Mr. Brown

with a crime, the State "compels" his counsel to "obtain a copy" of the evidence. Counsel is not "free to forgo a copy." *Brown*, 316 P.3d at 1112.

Both the Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington State Constitution guarantee defendants the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, *reh'g denied*, 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Both federal and Washington State courts have interpreted this right to guarantee defendants the benefit of "a reasonable investigation by defense counsel." *Boyd*, 160 Wn.2d at 434; *accord*, *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994) (requiring counsel to "at minimum, conduct a reasonable investigation enabling [defense attorneys] to make informed decisions about how to best represent [their] client"); *In re Brett*, 142 Wn.2d 868, 16 P.3d 601 (2001) ("When defense counsel knows or has reason to know of a capital defendant's medical and mental problems that are relevant to making an informed defense theory, defense counsel has a duty to conduct a reasonable investigation into the defendant's medical and mental health. . . ."). A proscribed manner or depth of investigation is not required, rather

> [t]he degree and extent of investigation required will vary depending upon the issues and facts of each case, but we hold that at the very least, counsel must reasonably evaluate

> the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty.

State v. A.N.J., 168 Wn.2d 91, 112-113, 225 P.3d 956 (2010). The duty to investigate a criminal case unquestionably originates from the defendant's constitutional guarantee to effective assistance of counsel.

Turning to the facts of Mr. Brown's case, the State possessed a 911 recording that contained statements from the alleged victim. It disclosed the fact of the recording's existence, and this disclosure was certainly mandated by *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), but did not provide it to Mr. Brown. Instead, the prosecutor required Mr. Brown to obtain a copy of the 911 recording through the Sheriff's department in exchange for a fee.

Defense counsel's duty to obtain the 911 recording featuring the alleged victim in this case is mandated by this court's holdings in *Brett, Boyd*, and *A.N.J.* The recording would contain information relating to what the alleged victim knew, what he was then told by law enforcement, and it would shed light into the alleged victim's demeanor immediately after the alleged threat but before Mr. Brown's arrest. It would be essential for the defense attorney to obtain the recording in order to properly advise Mr. Brown of his options prior to trial and develop strategies for trial and

perhaps sentencing. As the lower court noted in this case, "here, the State does not contest the 911 recording is necessary to an effective defense of Daniel Brown." *Brown*, 316 P.3d at 1112. An attorney's failure to obtain a copy of the recording would certainly call into question whether Mr. Brown received the constitutionally guaranteed benefit of a "reasonable investigation by defense counsel." *Boyd*, 160 Wn.2d at 434.

In addition, the Court of Appeals failed to recognize that its other rationale – that Mr. Brown or his lawyer could listen to or record the call – impinges on counsel's ability to confidentially review the State's evidence with his or her client. By forcing counsel into the prosecutor's office to access the discovery, the Court's opinion will allow the State to know when, where and for how long counsel has reviewed the evidence.

And reviewing discovery at the prosecutor's office also involves a "cost" to the defendant. It would require that defendants and their counsel purchase the proper portable technology to duplicate audio recordings, video recordings, and cloned hard drives at prosecutor's office.[3] Defense counsel would have to travel to the prosecutor's office to review the discovery. In many places in this state travel to the prosecutor's office by

---

[3] It is worth noting that the Spokane County Prosecutor's office "did not have the technical capability" to copy the disc. Apparently, only the Sheriff's office could afford the means to do so. *Brown* at 1111.

defense counsel would increase the attorney's fees associated with the review of the 911 call exponentially. The lower court's failure to understand the defense attorney's constitutionally mandated obligations when preparing for trial demonstrates that the published Court of Appeals opinion is erroneous and should be reviewed by this Court.

B. SIMILARLY, THE LOWER COURT COMMITTED OBVIOUS ERROR WHEN IT CONCLUDED THAT THE STATE DID NOT IMPOSE COSTS "INHERENT IN PROVIDING A CONSTITUTIONALLY GUARANTEED JURY TRIAL." RAP 13.5(B)(1).

RCW 10.01.160 prohibits the State from imposing costs "inherent in providing the constitutionally guaranteed jury trial." As discussed above, defendants have the right to a reasonable investigation of the charges against them. To satisfy that right, the State required Mr. Brown to pay a fee for a copy of the 911 recording at issue. By conditioning the production of that 911 recording on the payment of a fee prior to a finding of guilt, the State imposed a cost on Mr. Brown's right to a reasonable investigation in violation of RCW 10.01.160.

C. TO THE EXTENT THAT *STATE V. BOYD* SUGGESTED THAT THE IMPOSITION OF SUCH COSTS ARE PERMISSIBLE, IT IS INCORRECT

The Court of Appeals noted that in *Boyd*, this Court suggested that the defense might be required to pay the "reasonable cost of duplication"

of a mirror image hard drive. *Boyd*, 160 Wn.2d at 438. But this comment was made in the context of describing what provisions should be included within the protective order governing the defense's possession and use of the hard drive. This Court strongly suggested that "any order should also prohibit the making of additional copies, require that a copy of the order be kept with the evidence, bar its digitization, and *obligate the defense to pay the reasonable cost of duplication.*" *Id.* (emphasis added). As explained above, any order requiring the defense to pay for discovery prior to a finding of guilt violates Article 1, Section 22.

After accepting review, the Court can easily harmonize *Boyd* with Article 1, Section 22. *Boyd* did not address whether defendants could be charged for discovery-related costs before a finding of guilt under Article 1, Section 22. All that would be entailed to reconcile *Boyd* with Article 1, Section 22 would be for this court to note that a defendant could become "obligate[d] . . . to pay the reasonable cost of duplication," but only after a final judgment of guilt has been found.

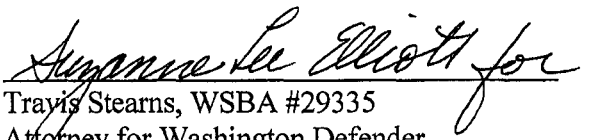
II.
CONCLUSION

This Court should grant Mr. Brown's petition for review on this important issue of first impression that will transform statewide criminal practice.

DATED this 11th day of April, 2014.

Respectfully submitted,

D. Jack Guthrie, WSBA #46404
Suzanne Lee Elliott, WSBA #12634
Attorney for Amicus Washington Association
of Criminal Defense Lawyers



Travis Stearns, WSBA #29335
Attorney for Washington Defender
Association

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of the foregoing brief on the following:

Mr. Douglas D. Phelps
Ms. Jill N. Hogberg
Phels & Associates, PS
2903 North Stout Road
Spokane Valley, WA 99206

Mr. Mark Lindsey
Spokane County Prosecutor's Office
110 West Mallon Avenue
Spokane, WA 99260-2043

April 11, 2014
Date

Christina Alburas

OFFICE RECEPTIONIST, CLERK

To: Christina Albouras
Subject: RE: State v. Daniel Lee Brown, No. 89913-4

Received 4-11-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Christina Albouras [mailto:calbouras@hotmail.com]
Sent: Friday, April 11, 2014 1:39 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Suzanne Elliott; Jack Guthrie
Subject: State v. Daniel Lee Brown, No. 89913-4

April 11, 2014

Dear Clerk:

Attached for filing in *State v. Daniel Lee Brown*, No. 89913-4, is a Motion of Washington Association of Criminal Defense Lawyers and Washington Defender Association to File Amicus Memorandum in Support of Review and an Amicus Memorandum Pursuant to RAP 13.4(h).

Please contact me with any questions. Thank you.

Sincerely,
Christina Alburas
Certified Paralegal
(206) 538-5301
* * * *
Law Office of Suzanne Lee Elliott
Suite 1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
Fax (206) 623-2186